ORIGINAL

ORIGINAL

No. 90-6047

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

THADDAEUS L. TURNER,

Petitioner,

vs.

STATE OF CALIFORNIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF CALIFORNIA

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JOHN K. VAN DE KAMP, Attorney General
of the State of California
RICHARD B. IGLEHART,
Chief Assistant Attorney General
HARLEY D. MAYFIELD,
Assistant Attorney General
PAT ZAHAROPOULOS,
Supervising Deputy Attorney General
GARRETT BEAUMONT,
Deputy Attorney General

110 West A Street, Suite 700
San Diego, California 92101
Telephone: (619) 237-7057

Attorneys for Respondent

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

PARTIES

Petitioner, Thaddaeus L. Turner, is a California state prisoner incarcerated under judgment of death in California State prison at San Quentin. Respondent is the People of the State of California.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

No. 90-6047

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

THADDAEUS L. TURNER,

Petitioner,

vs.

STATE OF CALIFORNIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF CALIFORNIA

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

Petitioner seeks review of an opinion of the California Supreme Court, People v. Turner, 50 Cal.3d 668 (1980), which affirmed his convictions of first degree murder (Cal. Pen. Code, §§ 187, 189) and robbery (Cal. Pen. Code, § 211), the special circumstance finding that the murder was committed while he was engaged in the commission of the robbery (Cal. Pen. Code, § 190.2, subd. (a)(17)(i)), and his death penalty. Petitioner has

attached the official report of the opinion to his petition in his Appendix A.

JURISDICTION

Petitioner invokes jurisdiction pursuant to Title 28, United States Code section 1257, subdivision (3).

STATUTES AND CONSTITUTIONAL PROVISIONS

Petitioner relies on the Eighth and Fourteenth Amendments to the United States Constitution, as well as California Penal Code sections 190.2 and 190.3. He has attached copies of sections 190.2 and 190.3, supra, to his petition in his Appendix C.

STATEMENT OF THE CASE

Following a jury trial, petitioner was convicted of first-degree murder with the special circumstance finding that the murder was committed during the commission of robbery (CT 183, 259) and was thereafter convicted of the robbery as well. (CT 265-268.) Following a subsequent penalty phase trial, the jury determined his penalty should be death. (CT 296.) The trial court sentenced appellant to death after denying his motions for new trial and modification of the verdict. (CT 305-341.)

On automatic appeal, the California Supreme Court affirmed the judgement in its entirety. (People v. Turner, supra, 50 Cal.3d 668.)

STATEMENT OF FACTS

The summary of facts is excerpted from the state court opinion (People v. Turner, supra, 50 Cal.3d at pp. 680-687.)

GUILT TRIAL

A. *Prosecution Evidence*

The victim, Roy Savage, was a middle-aged black man who taught mathematics at Merced College. He also directed the college's Extended Opportunity Program for disadvantaged youth. After his divorce, and while his daughter was away at college, Savage lived alone.

Savage was last seen alive on Saturday, April 14, in defendant's company. Amir Falahi worked under Savage in the Extended Opportunity Program at Merced College, and was also a salesclerk at Gottschalk's Department Store in Merced. Shortly before the 6:00 p.m. closing time on April 14, Savage came into the store with defendant. Savage told Falahi defendant was doing some work for him; as compensation, Savage bought defendant a shirt and pants at a cost of $20 to $30.

Augusti Albritton testified that Savage and defendant came to Albritton's home on the evening of April 14. Savage returned a pickup he borrowed from Albritton earlier in the week and retrieved his own Cadillac. Savage introduced defendant to Albritton during a 30- or 40-minute conversation.

On Monday, April 16, 1984, Savage's cousin, Gregory Mayo, arrived by prearrangement at Savage's home to do yard work. Approaching the rear of the house, as was his custom, Mayo noticed that Savage's car was not in the garage, the screen door was wide open, the screen had been cut, and there was blood on the back door itself. Looking through a window, Mayo saw something lying covered up on the floor inside. He entered, lifted the covering, and found Savage's dead body.

After arming himself with an axe handle and a tire iron, Mayo searched the house. He noticed numerous missing items, including two stereo sets, a tape cassette player, miniature speakers, wall statues, clothing, and the upstairs bedroom television set. Mayo summoned the police.

Responding detectives found numerous signs of a violent struggle. There were blood spatters on the front doorknob; spatters and bloody shoe prints were also found in the entry foyer. In the family room, there were spatters on the ceilings and walls, near the fireplace hearth, behind the couch, and on the drapes. A coffee table had been pushed aside, and its glass top was shattered and bloody. One of the liquor bottles on the bar was broken. Telephone cords in the family room and the upstairs bedroom had been cut, though the kitchen telephone had not been disabled. There was no blood on the cut cords. Mayo indicated that a stereo set was missing from the family room, and a speaker wire in that area was torn. A bloody television set

remained in the room. There were also bloodstains on the wall of the staircase to the second floor, and in nearby closets.

From the family room, the pattern of blood continued to the back door and out onto an enclosed rear patio. There detectives found Savage's body, lying face down. It had been covered neatly by two towels and perhaps a sheet. The victim's head was resting on a pillow.

The door onto the patio was bent, as if by pushing, and blood patterns suggested the body had been dragged from the door to its final position. A cabinet in the patio had been pried open. The victim was fully clothed, and his clothing was undisturbed. He had sustained multiple stab wounds. Mayo advised that two distinctive rings were missing from Savage's fingers, but these were later discovered under a rug less than a foot from the body. A gold chain Savage customarily wore was missing.

Mayo noticed that a fireplace tool was missing from the hearth in the family room; the implement was later found in one of the upstairs bedrooms. Mayo also located and turned over to police Savage's private telephone notebook. The notebook included the name "Thad" next to defendant's telephone number.

Pathologist Murdoch performed an autopsy which revealed that Savage had died of stab wounds between 24 and 48 hours earlier. Savage had been stabbed over 40 times in the abdomen, chest, neck, arms, leg, hands, and back. The wounds were most likely inflicted by a buck knife. One wound nearly severed Savage's thumb. The angles of the wounds differed, suggesting

the victim was not stationary. Some of the wounds were defensive. Savage had bled to death from six penetrating wounds that punctured the heart and lungs. The liver and spleen had also been perforated by penetrating abdominal wounds. At least two of the wounds on the body were inflicted after death.

The autopsy further disclosed that Savage had eaten recently, and no alcohol or common drugs were found in a sample of his blood. There was no semen in Savage's rectum, though the anal opening was looser than normal. Seminal fluid was found at the tip of the victim's penis, indicating either recent sexual excitement or activity, or ejaculation after death.

Around 9:00 p.m., on Monday, April 16, two California Highway Patrol officers driving eastward on Ventura Boulevard in Fresno passed a Cadillac parked in the same direction. Defendant was standing in front of the car, talking to the driver of another vehicle. The driver's door of the Cadillac was open and sticking out into traffic, creating a hazard.

As the officers made a U-turn to investigate, defendant got into the Cadillac and drove off. The officers made a second U-turn to follow. At the same time, they ran a radio license check and learned that the Cadillac was reported stolen. They continued to follow as defendant ran a traffic light. The officers turned on their red light, but defendant pulled over only after they also activated their siren.

Officer Spencer ordered defendant to alight from the Cadillac and lie on the ground. As this occurred, a further

radio dispatch indicated that the Cadillac might have been involved in a Merced murder. Spencer handcuffed defendant and discovered a buck knife in a scabbard on defendant's belt.

The Cadillac was towed and later searched pursuant to warrant. The television missing from Savage's bedroom was found in the car's trunk, and Savage's wallet was found in the glove compartment. Blood was discovered in the Cadillac's trunk and on its front seat. There was also blood on the stolen television, on a piece of paper found in the car, on defendant's buck knife, and on an athletic shoe worn by defendant at the time of his arrest. Samples from the television and the knife were consistent with the victim's blood, but inconsistent with defendant's.

Examination of defendant's person after his arrest disclosed only small scratches on his arms. Defendant had no self-defense wounds or injuries.

B. *Defense Evidence*

1. *Defendant's Testimony*

Defendant took the stand in his own behalf. In response to questions from his own counsel, he acknowledged two prior felonies: a 1982 conviction for receiving stolen property, resulting in a prison sentence, and an earlier robbery conviction, for which defendant was committed to the California Youth Authority (CYA).

Defendant admitted stabbing and killing Savage. However, he claimed the incident was provoked by Savage's sudden, violent sexual advances.

Defendant testified as follows: After his release from prison in September 1983, he returned to Fresno to live with his mother and younger sister. At the time of his arrest for Savage's murder, he was working full-time as a laborer and carpenter's helper, earning $8 to $9 per hour.

According to defendant, he was waiting for a bus in Fresno one Friday evening after work. The bus stop was located at the corner of Blackstone and Belmont, near a homosexual bar. Savage, a stranger, pulled up to the stop in an orange Volkswagen and offered defendant a ride. During the two-mile drive downtown, Savage said he was an engineer from Merced and learned that defendant did occasional yard maintenance work. Savage offered defendant $30 to do yard work for him on Saturday of the following weekend; defendant accepted. Savage gave defendant his telephone number and agreed to pick defendant up in Fresno, some 50 miles from Merced, if defendant had no transportation.

Telephone arrangements were subsequently made that someone would pick up defendant in Fresno early on the agreed Saturday morning. Savage himself arrived at the appointed time in a pickup truck and drove defendant back to Merced. Defendant was "pretty gone" on marijuana and phencyclidine (PCP).

After working a short time in Savage's yard, defendant took a break and smoked half a "Sherm" (a cigarette laced with

PCP). Savage invited defendant in and gave him orange juice. Defendant observed there was more work than one man could do; Savage said not to worry because a relative was coming soon to help. Savage engaged defendant in conversation, learning of his prison and drug problems, and gave defendant a tour of the house.

Sometime before noon, Savage said he needed to take a television to Gottschalk's Department Store for repairs. After they dropped off the set, the two proceeded into the pickup to the Albritton home. They stayed for 15 to 30 minutes, then drove off in a Cadillac, leaving the pickup behind. Savage bought defendant lunch at a Burger King restaurant, and the two then returned to Savage's house. Savage said nothing more about yard work. Defendant played tapes on Savage's stereo. Savage offered defendant drinks, and defendant had three or four brandies.

At some point, Savage said he would buy defendant clothing in compensation for his work, but would not pay cash because defendant would use the money to buy drugs. They drove back to Gottschalk's, where Savage purchased defendant a shirt and a pair of pants. Back at Savage's home, Savage offered to cook defendant dinner; defendant declined. After talking on the kitchen telephone, Savage himself ate a steak meal, inviting defendant to listen to tapes in the meantime.

Savage then agreed to drive defendant home and promised he would be ready in a few minutes. While defendant remained seated in the family room, listening to tapes, Savage went

upstairs. Savage returned wearing a T-shirt and blue shorts, placed a hand on defendant's shoulder and said, "Let's go to bed."

After determining he had heard Savage correctly, defendant pushed Savage back, but Savage began chasing defendant through the house. Finally, Savage hit defendant with some sort of wooden club. Defendant kicked Savage in the stomach and ran outside.

After lingering briefly beside the house, defendant walked up the street, smoking a PCP cigarette as he went. He bought a pack of cigarettes in a convenience store; as he emerged, Savage drove up in the Cadillac. Savage approached, apologized for his behavior, and agreed he would take defendant home after they retrieved defendant's coat.

However, once back at the house, Savage resumed his insistent sexual entreaties. Defendant repeatedly refused, offering instead to procure a girl for Savage or to furnish him "Spanish fly." Defendant said he only wanted to go home, and he agreed not to tell anyone about Savage's advances. After extended argument, Savage left the room.

Returning, Savage came up behind defendant and grabbed him around the breast, arm, and neck. As the two men struggled, Savage pinned defendant on the couch and was choking him. Defendant pulled his buck knife from his back pocket and attempted to stab Savage in the shoulder. However, defendant missed his aim and the blade struck Savage's neck.

Defendant then pushed Savage off, dropping the knife in the process. Savage picked up a fireplace tool, swung it twice at defendant, and dropped it. As defendant grabbed the tool and turned to retrieved the knife, Savage approached from behind and accidentally fell on the blade, which deeply penetrated Savage's chest and caused severe bleeding.

Though defendant warned Savage to desist, and was now brandishing both the fireplace tool and the knife, Savage kept coming. As he advanced, Savage "was just talking about 'Baby I love you.'" Savage grabbed defendant again, and defendant stabbed Savage "a couple" of times. Again defendant dropped his knife.

Savage then ran to the patio, and defendant ran upstairs. Defendant threw the fireplace tool into one of the bedrooms, went into the master bedroom to get his coat, saw a television on a stand, and picked it up to use as a weapon in case Savage continued the pursuit. After a time, defendant went downstairs to retrieve his knife, still carrying the television. There he saw Savage lying face down on the patio floor. Defendant put down the television, checked Savage's pulse, took off Savage's watch and rings, checked the pulse again, found none, and surmised that Savage was dead.

Defendant jumped on the bar, poured himself a drink, and checked Savage's pulse once more. Finally convinced that Savage had died, defendant went to the bedroom of Savage's daughter, got a white blanket from her bed, and placed the

blanket over the body as he had learned from watching television. Defendant then grabbed the television and Savage's car keys, ran outside, threw the television in the back seat of Savage's car, and drove back to Fresno.

According to defendant, he decided not to take Savage's watch and rings before leaving because he thought it was wrong to rob a dead body. He took the television in "panic" and appropriated the car only because he had no other transportation home. Defendant did not remember cutting the telephone cords. He also did not recall stabbing Savage 44 to 46 times, as the autopsy pathologist testified, though his knife was sharp, and he kept jabbing at Savage to keep him away. Defendant could not account for many of Savage's wounds.

Defendant denied using a sheet and pillows to cover Savage's body, said he did not move the body or wipe up blood, and claimed the body was found in a different position than he left it. After returning to Fresno, defendant explained he parked Savage's car near his home and placed the television in the trunk. He did not intend to sell the television, since it did not belong to him. He did not realize Savage's wallet was in the glove compartment of the car.

Defendant said that the next evening, a Sunday, he moved Savage's car so its hubcaps would not be stolen. Defendant's father drove him to work on Monday morning, and defendant did not use Savage's car for that purpose. After work on Monday, defendant washed and vacuumed the Cadillac's interior.

He then set out for Valley Medical Center, where he intended to leave the car in the parking lot. En route, he encountered a woman he knew and stopped to talk to her. The two agreed to meet for a drink. He had begun following her when the Highway Patrol officers overtook and arrested him.

Defendant insisted he was not himself homosexual, and he claimed surprise and panic when confronted with Savage's advances. However, defendant acknowledged he was familiar with homosexuality from his time in prison, and that homosexuality did not particularly bother him. Defendant also indicated he was strong and lifting weights in prison.

2. *Other Defense Witnessess*

Jay Bradstone had worked at the Back Door, a bar on Blackstone near Belmont in Fresno. Bradstone testified the Back Door had a reputation as a gay bar, though heterosexuals also patronized it. Bradstone had seen Savage in the bar on two or three occasions.

Merced Detective Strength testified that defendant's home was searched on Tuesday, April 17, 1984, for items listed by Mayo as missing from Savage's home. None was found. Strength also said he saw signs in Savage's home that someone had tried to wipe up the blood near the back door. Finally, Strength claimed Bradstone had mentioned that Savage was a frequent customer of the Back Door.

Phillip Hamm, a psychologist, testified in defendant's behalf. Hamm conducted two interviews with defendant, reviewed

police reports and the preliminary hearing transcript, and administered standardized tests for personality traits and intelligence. Dr. Hamm concluded that defendant, though not normally psychotic, is passive, submissive, and below average in intelligence, judgment, and self-esteem. According to Dr. Hamm, defendant feels discomfort in unfamiliar situations, quickly becomes disorganized under stress, and can easily be influenced by persons he perceives as having greater status and authority.

Dr. Hamm believed defendant felt grateful for Savage's kindness and became confused by Savage's sudden advances, which were calculated to take advantage of Savage's higher social status and defendant's passivity. These conditions, plus defendant's consumption of alcohol and PCP and his sense of isolation from familiar surroundings, diminished defendant's ability to cope with Savage's conduct. Defendant became dissociated during the homicide, experienced an actual or borderline psychotic state, and developed partial amnesia about what had occurred.

C. *Prosecution rebuttal*

The People called forensic psychiatrist Stewart Coleman to testify that psychological tests and opinions are useless in the courtroom. Merced Detective Wright was recalled to state he examined a fireplace poker from Savage's house and found no blood. Wright also found no bloody sheet or blanket.

Recalled to the stand, Detective Strength testified that on April 16, 1984, after his arrest, defendant waived his

Miranda rights and agreed to talk to the police. Under interrogation, defendant denied knowing Savage. He also responded either that he could not remember, or could not answer, when asked whether he had ever been in Merced and where he had been the preceding Saturday night. After such questions had been repeated to similar effect several times, Strength saw that defendant was tired and terminated the interview.

PENALTY TRIAL

A. *Prosecution Evidence*

The only new prosecution evidence introduced at the penalty phase concerned the circumstances of the homicide. Pathologist Murdoch was recalled to testify in detail concerning the number, angles, depths, and force of the stab wounds in Savage's body. Dr. Murdoch emphasized that most of the wounds were deep and were inflicted with considerable force. According to Dr. Murdoch, the superficiality of certain cuts was caused by the fact that the knife had struck bone before penetrating deeply. Dr. Murdoch's testimony was illustrated by photographs which showed forcep-like devices inserted in the wounds to demonstrate their depths.

B. *Defense Evidence*

Detective Strength testified that the remote control for the upstairs television was not taken. Ruth Turner,

defendant's mother, testified that defendant had been a gentle and helpful child and youth, who made average grades in school and caused little trouble; he gave her a portion of each paycheck from his post-prison job as a carpenter's helper. Ms. Turner noted that defendant's brother and three sisters had never been in trouble with the law; two sisters were currently attending college. A half-sister, an older cousin, and a neighbor confirmed that defendant had been quiet, gentle, and loving. A job developer, Louis Coleman, testified that defendant received good reports for punctuality and reliability in post-prison job placements.

SUMMARY OF REASONS WHY THE PETITION SHOULD BE DENIED

The petition for writ of certiorari does not raise any issues that merit the exercise of this Court's discretionary jurisdiction. The California Supreme Court did not violate petitioner's Eighth and Fourteenth Amendment rights by finding that the jury necessarily rejected any theory that petitioner committed theft instead of robbery under instructions given by the trial court. The California Supreme Court did not violate petitioner's Eighth and Fourteenth Amendment rights by ruling that the death penalty was not disproportionate to his individual culpability and declining his invitation to undertake further comparative, intercase proportionality review. The California Supreme Court properly ruled that the prosecutor's argument did

not mislead jurors regarding their discretion and responsibility to determine the appropriate penalty under all the evidence.

ARGUMENT

I

THE CALIFORNIA SUPREME COURT DID NOT VIOLATE PETITIONER'S EIGHTH AND FOURTEENTH AMENDMENT RIGHTS BY RULING THAT THE ISSUE OF WHETHER PETITIONER COMMITTED MERE THEFT RATHER THAN ROBBERY WAS RESOLVED ADVERSELY TO HIM UNDER INSTRUCTIONS GIVEN BY THE TRIAL COURT

Petitioner argues that the California Supreme Court violated his constitutional rights to due process and to be free from cruel and unusual punishment by substituting itself for the jury as a fact finder of his guilt or innocence. Petitioner claims the state Supreme Court did so by speculating that the failure to give the jury a theft instruction as a lesser included offense of robbery was harmless in light of the other instructions given by the trial court. (Petn., pp. 8-15.) Petitioner's argument should be rejected.

The California Supreme Court did not substitute itself for the jury in ruling that the failure to give the theft instruction, sua sponte, was harmless. Rather, it noted that the jury was, in fact, instructed that petitioner could not be found guilty of robbery, the special circumstance of murder committed in the course of robbery, or first degree felony murder, if he committed theft rather than robbery. (People v. Turner, supra, 50 Cal.3d at pp. 691-693.) The California Supreme Court, therefore, ruled that the issue of whether petitioner committed theft rather than robbery was resolved adversely to petitioner under instructions given to the jury. (People v. Turner, supra, 50 Cal.3d at pp. 690-693.)

Its ruling reflected the fact that petitioner's constitutional rights had not been violated because the trial court's instructions, viewed as a whole, did not remove the prosecution's burden of proving every element of the charge beyond a reasonable doubt. (Carella v. California, 491 U.S. ___, 105 L.Ed.2d 218, 221-223, 109 S.Ct. ___ (1989); Cabana v. Bullock, 474 U.S. 376, 384-385 (1985).) In light of the instructions which were given, petitioner could not establish a constitutional violation simply by demonstrating that an alleged trial-related error could or might have affected the jury. (Boyde v. California, 494 U.S. ___, 108 L.Ed.2d 316, 329, fn. 4, 110 S.Ct. __ (1990).)

Unlike Beck v. Alabama, 447 U.S. 625 (1980), upon which petitioner relies, this case does not involve a state statute prohibiting lesser included offenses in capital cases nor does it involve a jury which was restricted to either convicting the defendant of the capital crime or acquitting him, regardless of the evidence. On the contrary, the instructions in the case at hand gave the jury the option of convicting petitioner of second degree murder or voluntary or involuntary manslaughter, as an alternative to acquitting him, if the jury believed petitioner only decided to steal the victim's property after the victim was dead rather than robbing the victim while he was alive. (CT 203-244, 251.)

/

/

II

THE CALIFORNIA SUPREME COURT DID NOT VIOLATE PETITIONER'S EIGHTH AND FOURTEENTH AMENDMENT RIGHTS BY RULING THAT THE DEATH PENALTY WAS NOT DISPROPORTIONATE TO HIS INDIVIDUAL CULPABILITY AND BY DECLINING HIS INVITATION TO CONDUCT FURTHER, INTERCASE PROPORTIONALITY REVIEW

Petitioner argues that the California Supreme Court violated his constitutional rights to due process and to be free of cruel and unusual punishment by ruling that the death penalty was not disproportionate to his individual culpability and declining his invitation to conduct further, intercase proportionality review. (Petn., pp. 16-23.) Petitioner's argument should be rejected.

The California Supreme Court properly ruled that the death penalty was not disproportionate to petitioner's individual culpability in light of evidence showing that, while a guest in the victim's home, he committed a savage, sustained and murderous knife assault upon his unarmed host, the evidence further suggesting that he planned in advance to rob and personally kill the victim, relying on feigned friendship to win the victim's trust and gain access to his property. (People v. Turner, supra, 50 Cal.3d at p. 718.) Respondent further notes petitioner's admission of two prior convictions, one for receiving stolen property and the other for robbery. (People v. Turner, supra, 50 Cal.3d at pp. 682, 714.) Petitioner could not show that the death penalty was disproportionate to his culpability in light of the facts of the case, particularly since the Eighth Amendment

does not prohibit the death penalty for a defendant whose "participation is major and whose mental state is one of reckless indifference to the value of human life." (Tison v. Arizona, 481 U.S. 137 (1986), cited in People v. Babbit, 45 Cal.3d 660, 726 (1988).)

Petitioner stabbed the victim 40 times with a buck knife. His punishment is clearly not disproportionate to this brutal murder in the course of a robbery. Since petitioner's death sentence was imposed under sentencing procedures that focused discretion "on the particularized nature of the crime and the particularized characteristics of the individual defendant," additional, intercase proportionality review was not required in order to assure that the sentence was not "wantonly and freakishly" imposed and thus disproportionate in violation of the Eighth Amendment. (Pulley v. Harris, 465 U.S. 37, 43-54 (1983); McCleskey v. Kemp, 481 U.S. 279, 306-308 (1986).)

/

/

/

/

/

/

/

/

/

/

III.

THE CALIFORNIA SUPREME COURT PROPERLY RULED THAT THE PROSECUTOR'S ARGUMENT DID NOT MISLEAD JURORS ABOUT THEIR DISCRETION AND RESPONSIBILITY TO DETERMINE THE APPROPRIATE PENALTY UNDER ALL THE EVIDENCE

Petitioner argues that the prosecutor violated his right to be free from cruel and unusual punishment under the Eighth Amendment by referring to the absence of three mitigating factors as aggravating factors in the prosecution's penalty phase argument. (Petn., pp. 27-31.) Petitioner's argument should be rejected.

Arguments of counsel, which carry less weight than instructions by the court, should be reviewed in the context in which they are made. (Boyde v. California, supra, 108 L.Ed.2d at pp. 331-332.) In the case at hand, the prosecutor, without objection by petitioner, was merely discussing the factors listed in California Penal Code section 190.3, when he made the remarks challenged by petitioner for the first time on appeal.[1] (RT 1847-1851.) He concluded his discussion of the factors by stating, "The main thing it seems to me to consider is what has the Defendant done(.) It's by his acts that a person really is known." (RT 1851.) The prosecutor was thereby urging that the "nature and circumstances of the present offense" warranted the death penalty within the meaning of Section 190.3, supra.

---

1. To assist this Court to evaluate the challenged remarks in context, respondent has attached the prosecutor's penalty phase closing argument and rebuttal argument in their entirety as Appendix "A".

Previous decisions of the California Supreme Court suggested that brief references to the absence of mitigation as aggravation, when made without objection, should be deemed neither misconduct nor prejudicial. (People v. Williams, 44 Cal.3d 883, 960, fn. 43 (1988); People v. Siripongs, 45 Cal.3d 548, 583 (1988).)

In the case at hand, the California Supreme Court properly ruled that the prosecutor's remarks, which were not objected to by petitioner, did not mislead the jury, which was instructed to consider only those sentencing factors which were applicable in accordance with California Penal Code section 190.3, supra, and CALJIC 8.84.1 (1984 Revision). (People v. Turner, supra, 50 Cal.3d at pp. 713-714.) (CT 271-272; RT 1841-1842.) It further properly noted that, in light of the overwhelming balance of aggravating evidence, there was no reasonable possibility that the prosecutor's characterizations affected the penalty verdict. (People v. Turner, supra, at p. 714.)

Because the California Supreme Court's ruling properly foreclosed any claim that the jurors were misled about their discretion and responsibility to determine the appropriate penalty under all the evidence, petitioner's allegation of misconduct does not raise a federal Constitutional issue worthy of this Court's consideration under 28 U.S.C. 1257(3), supra.

CONCLUSION

Therefore, the petition for writ of certiorari should be denied.

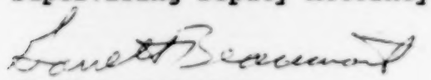
DATED: November 13, 1990

JOHN K. VAN DE KAMP, Attorney General
of the State of California

RICHARD B. IGLEHART
Chief Assistant Attorney General

HARLEY D. MAYFIELD
Assistant Attorney General

PAT ZAHAROPOULOS
Supervising Deputy Attorney General



GARRETT BEAUMONT
Deputy Attorney General

GB:bl
10/31/90
SD90XW0005

APPENDIX

This does not mean that you are at liberty to disregard the testimony of the greater number of witnesses merely from caprice or prejudice, or from a desire to favor one side as against the other.

It does mean that you are not to decide an issue by the simple process of counting the number of witnesses who have testified on the opposing sides.

It means that the final test is not in the relative number of witnesses, but in the relative convincing force of the evidence.

Any evidence of an aggravating factor is to be disregarded by you unless you unanimously agree that the factor has been proved beyond a reasonable doubt.

Reasonable doubt is defined as follows. It is not a mere possible doubt, because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt.

It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge.

Now, the attorneys will argue, and then I'll give the last instruction.

MR. HALLFORD: Ladies and gentlemen, you've been given guidelines as the Court read to you and as you have

there, one of the instructions in the law says if you conclude the aggravating circumstances outweigh the mitigating circumstances, you shall impose the sentence of death.

However, if you determine that the mitigating circumstances outweigh the aggravating circumstances, you shall impose a sentence of confinement in state prison for life without possibility of parole

And in one of your instructions there, it's listed, those factor are listed one by one. You're to weigh them, and if one, if the aggravating outweighs the mitigating, then, decision's obvious. Otherwise it's obvious the other directions.

What are those factors and should we consider them one by one. I might say, before we do that, you can consider all the evidence you heard, not only what you heard here, but the evidence that you've heard throughout the other days of trial in making up your minds and in reaching a decision.

What are some of the circumstances? One, the absence -- presence or absence of any prior felony convictions. That's pretty obvious. The Defendant himself admitted those on the stand. He had a robbery for which he was sent to a state institution. After that, he was sent to prison, again, for receiving.

And he only got out of that prison in September

of 1983, within six months, seven months, he was involved in this, what I term as a grisly murder. And I think that's a proper term for it. A very brutal and grisly murder.

Another factor is whether or not the victim was a participant in the Defendant's homicidal conduct or consented to the homicidal act.

Obviously that is not a mitigating factor. There is no indication that the victim was involved in the homicidal conduct. He was running. He was stabbed in the back. He didn't get involved in it in any way whatsoever, as far as the homicide is concerned.

Of course, the Defendant would have us believe another factor was involved. Another, so it seems to me that the two that I've mentioned are aggravating factors weighing against the Defendant.

Another aggravating factor is whether or not the offense was committed under circumstances that the Defendant reasonably believed to be moral justification or extenuation of his conduct.

Well, he has tried to offer you a reason. Unfortunately, there was robbery. Unfortunately for him, and his story, it's just unbelievable what he told you about the sexual attack. And that was the only reason, and there was no robbery motive.

In the first place, you've already made that

decision, so I won't rehash that. You know that one, the Defendant -- the victim was fully clothed, if you saw the tape, you know that he was buckled up, his shoes on. There's no indication he was making any particular overt attack of any sort and I'm sure you've come to that decision.

You've also considered the fact that the Defendant cut the wires. No blood on it. Obviously before the crime. And he had the factor of robbery in his mind before this stabbing.

I doubt that we could say that he felt there was a moral justification or extenuation of his conduct. He would, however, have you believe that.

Another factor that you're to consider is whether or not the Defendant acted under extreme duress or under the substantial domination of another person. Obviously not. There was no other person around.

There was no one else urging him to do the thing he did. No one urging him to take the T.V., the stereo or anything of that sort. No one urging him to sink that knife into the victim 40, 45 times. That is an -- obviously an aggravating factor which you could -- should consider.

A possible mitigating factor is the fact he may have been under intoxication, under some drugs or under intoxication of some sort. We don't know. Obviously the victim was not.

Whatever happened, the victim did not join him

in any alcohol, obviously did not join him in any drugs in any way. You may recall that Dr. Murdoch stated that in examination of his blood for alcohol and common drugs were negative. That means at the time of death there were no drugs or alcohol in the victim's system.

Whether or not they were in the Defendant's system at the time, we can't tell. Obviously because we could not take an examination at the time of the killing. He was found, the Defendant, later -- two days later. So tests at that time wouldn't reveal whether or not he was under the influence -- the Defendant was under the influence at the time of the killing.

In any event, if he was under the influence, I suppose under law, that's considered a mitigating factor as well as his age.

The main thing it seems to me to consider is what has the Defendant done? It's by his acts that a person really is known. It's by his acts that the person really is.

What, what has he done? Within six months after he's out of prison, and he'd been in prison twice, he was involved in this most horrible, almost inhumane type of crime.

You don't even hear or see or read about acts where the Defendant over and over, again and again, and with force each time, according to Dr. Murdoch, kills and

overkills this many times.

He has earned no sympathy from you. Although the law mentioned sympathy, mercy, certainly if you give him sympathy or mercy or pity, that he gave to that victim, there will be no question about your decision.

Whatever you give, he has earned, he has deserved by his conduct.

MR. ELLERY: Ladies and gentlemen, your verdict has indicated to me you didn't agree with me a number of things I said earlier. And that's the -- unfortunately, that's the extent of our communication, or, at least, your communication with me.

I may refer here in the course of this argument to things you found insignificant. I may refer to things that you found to be true or untrue beyond argument.

If I do bring up things that either you dismissed as insignificant or that you cannot tolerate an argument about, I'm sorry. It's just that the amount of your communication with me is necessarily limited, and I intend to cover those things that I think may be subject to your consideration here.

One of the things is certainty. The death penalty is rather permanent solution to the problem. You were -- the Court, in instructing you about reasonable doubt before has talked about mere possible doubt, and said that's not quite what we mean.

MR. HALLFORD: Counsel seeks to place upon your conscience the burden and equates it with what Thaddaeus did. That's wrong. And you shouldn't allow that to happen to you.

If we count under the law, the mitigating factors and the aggravating factors, if we just count them, one, two, three, four, and add them up, the chances are you'll find that there are more aggravating factors than mitigating factors in this case. But, the law doesn't make it that simple.

It doesn't say what weight you give to each factor. And ultimately it's upon you. But, if simply look at those factors and add them up, mechanically, you'll probably see there are more aggravating factors against the Defendant than are mitigating factors.

Defendant seeks also to revive in you doubt, and that's quite natural that he should do that. And, as I mentioned in the main trial, there are always certain factors that we don't know, when only one person is before you, and he's on trial, the victim cannot testify.

And he can't talk. And he can't speak up. He has no one to speak for him. So it's necessary to look at the facts. And you've gone through those. There are certain certainties that are sufficient for you to have made your decision.

For instance, he brings up the fact that there

is a remote control device. What bearing that has on the case, I don't know. It was some 15 odd feet away from the T.V. that he took, not attached to it.

And the Defendant would have no reason to really know about it. He hadn't been there long enough. As a matter of fact, he didn't know about the telephones. He missed one of the telephones when he cut the cord; obviously.

Was it before or afterwards? I think it's pretty clear. The Defendant -- Counsel tries to bring that out to have you doubt, he wants you to feel doubtful about it.

Well, for one thing, there was no blood on it. You looked at it yourself. The expert said there was no blood on it. And the Defendant was dripping with blood, even when he went outside, he was dripping blood along the street. It had to be bloody. The doorknob was bloody. The door was bloody, anything he touched. If he'd done it afterwards, he'd have to have a bloody hand.

Furthermore, what purpose would he have in cutting the cords afterwards when the man he knew was dead. No question about it. The fact that he -- the cords were cut. I think no question about the fact that he had robbery in mind when he cut it.

Towels and the pillow case, obviously he, the Defendant, intended to indicate to you that somebody else had been in there. That's why he said some other covering

was on the body, rather than the towels and the sheets, which he placed there.

That was his effort to try to bring in a red herring to indicate that maybe somebody else had been in there. I don't think that you could or would have believed a thing of that sort.

Furthermore, the pillow was simply resting against the head where there was no blood, and there would have been no blood on it at all. It was not placed under, obviously if you looked at the picture, it was only placed up against it by chance.

Fireplace tool had no blood on it. It has really no significance. The Defendant's Counsel says because he admitted so much, he makes a point of this, because he admitted so much, the he must be telling you the truth. Because it's somehow in his favor to confess some of these things.

Well, I think I explained that, and I don't want to rehash it, but, remember, he didn't explain so much He was not so honest when the officers first picked him up. He denied it and wouldn't talk.

It was only after they were able to prove, to secure blood sample and prints, and so forth, that he knew he was in effect found guilty by the evidence, that he admitted being there.

How can you explain, really, the fact that he

stabbed him 40 times or 45 times with force to kill, obviously, on each one of those blows? It was a -- it's a horrible crime.

If we consider that one of the factors, and that's one of the factors that you're considering, the circumstances in the crime, the Defendant was convicted. It's one of the aggravating factors.

If you show mercy or pity or sympathy, you certainly will not be showing that, you will be showing something that the Defendant did not show in anybody.

Whatever you decision is, I'm sure the community will appreciate your time and effort here, whatever your decision is, will be a proper one.

THE COURT: It is now your duty to determine which of the two penalties, death or confinement in the state prison for life without possibility of parole, shall be imposed on Defendant.

After having heard all of the evidence and after having heard and considered the arguments of Counsel, you shall take in -- you shall consider, take into account and be guided by the applicable factors of aggravating and mitigating circumstances upon which you have been instructed.

If you conclude that the aggravating circumstances outweigh the mitigating circumstances, you shall impose a sentence of death.

However, if you determine that the mitigating

AFFIDAVIT OF SERVICE BY MAIL

Attorney:

JOHN K. VAN DE KAMP
Attorney General of
the State of California
GARRETT BEAUMONT,
Deputy Attorney General

110 West A Street, Suite 700
San Diego, California 92101
Telephone: (619) 237-7057

No: 90-6047
October Term, 1990

THADDAEUS L. TURNER,

Petitioner,

v.

THE STATE OF CALIFORNIA,

Respondent.

I, THE UNDERSIGNED, say: I am a citizen of the United States, am 18 years of age or over, employed in the County of San Diego in which County the below stated mailing occurred, and not a party to the subject cause, my business address being 110 West A Street, Suite 700, San Diego, California 92101.

I have served the within BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI as follows: To Joseph F. Spaniol, Clerk, Supreme Court of the United States, Washington, D.C. 20543, an original and nine (9) copies, of which a true and correct copy of the document filed in this cause is hereunto affixed; AND, by placing one copy in a separate envelope addressed for and to each addressee named as follows:

Dennis A. Fischer
1448 Fifteenth Street, Suite 206
Santa Monica, CA 94105

Court of Appeal
Fifth Appellate District
2525 Capitol Street
Fresno, CA 92702

California Supreme Court
455 Golden Gate Avenue, Room 4250
San Francisco, CA 94102

District Attorney
Merced County
2222 "M" Street
Merced, CA 95340

Kenneth L. Randol, Clerk
Merced County Superior Court
2222 "M" Street
Merced, CA 95340

Each envelope was then sealed and with the postage prepaid deposited in the United States mail by me at San Diego, California, on the 19th day of July, 1990.

There is a delivery service by United States Mail at each place so addressed or regular communication by United States Mail between the place of mailing and each place so addressed.

I declare under penalty of perjury that the foregoing is true and correct.

Dated at San Diego, California, November 16, 1990.

Blanca Lopez
BLANCA LOPEZ

Subscribed and sworn to before me
this 16th day of November 1990.

Jean M. Burns
Notary Public in and for said County and State